

Kelly v Hiler

2007 NY Slip Op 32488(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0104104/2006

Judge: Barbara Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT.

Index Number : 104104/2006

KELLY, JING

vs

HILER, GIL

Sequence Number : 002

DISM ACTION/INCONVENIENT FORUM

PART 12

104104/06

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

002

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/07



BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IA PART 12

-----X
JING KELLY, f/k/a JING XIONG, Individually,
and TRISTRAM KELLY, a Child Under the Age
of 8 Years, by and through his natural
mother, JING KELLY f/k/a JING XIONG,

Plaintiffs,

- against -

GAIL K. HILER, JAMES F.X. HILER, DOUGLAS
KELLY, CORRINE KELLY and TRACY KELLY,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 104104/06
Motion Seq. Nos. 002
and 003

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 002 and 003 are consolidated for
disposition.

This is an action for intentional infliction of emotional
distress (first cause of action), abuse of process (second cause of
action), malicious prosecution (third cause of action), intentional
interference with custodial rights (fourth cause of action),
negligence (fifth cause of action), gross negligence (sixth cause
of action), conversion and/or misappropriation (seventh cause of
action), breach of fiduciary duty (eighth cause of action), and an
accounting (ninth cause of action).

Defendants Gail K. Hiler, James F.X. Hiler, Douglas Kelly and
Corinne Kelly now move (under motion sequence number 002) for an
order:

(1) dismissing the Amended Complaint on the grounds that (a) it fails to state a cause of action, (b) there are defenses based on documentary evidence; and (c) plaintiff's causes of action alleging intentional torts are barred by the applicable one-year statute of limitations; and

(2) dismissing claims by the "involuntary" infant plaintiff Tristram Kelly and removing his name from the caption on the ground that plaintiff Jing Kelly lacks the capacity to join him as a plaintiff.

Plaintiffs oppose the motion and move (under motion sequence number 003) for an order pursuant to CPLR § 1202(a)(3) appointing plaintiff Jing Kelly, the natural mother and guardian of Tristram Kelly, as Guardian Ad Litem for him in this action.

Background

Plaintiff Jing Kelly, formerly known as Jing Xiong, is the mother of the infant plaintiff Tristram Kelly who was born on May 29, 2000. The child is currently living in California with his paternal uncle, defendant Douglas Kelly and his wife, defendant Corrine Kelly ("the Kellys").

Tristram was removed from the home of his parents, Jing and her then-husband, Craig Kelly, by the New York City Administration

for Children's Services ("ACS") on June 10, 2000, when he was only twelve days old, as a result of allegations of neglect stemming from acts of domestic violence in the home. Plaintiff claims that Craig was an alcoholic who was emotionally, physically, verbally and sexually abusive towards her. Jing was also accused of committing acts of domestic violence.

By Order dated December 21, 2000, Tristram was 'paroled' to defendants Gail K. Hiler and James F.X. Hiler ("the Hilers"),¹ Craig's sister and brother-in-law. During 2001, when Tristram was living pursuant to that Order in Larchmont with the Hilers, Jing was granted supervised, and later unsupervised, visitation with her son.

During that time, Jing came to believe that her son was being abused by the Hilers, and took him (without court permission) to China on or about June 20, 2001, after an unsupervised visit.

By Judgment dated November 16, 2001 (under Index No. 316424/00), the Hon. Richard Braun granted a petition by Craig for divorce from Jing, and awarded him sole custody of Tristram who was

¹ The Hilers are both attorneys admitted to the New York Bar.

still at an unknown location with Jing in China. Craig died of cancer on or about October 24, 2002.

Jing and Tristram attempted to re-enter the United States on or about January 3, 2003, at which time Jing was arrested when her plane arrived in Vancouver, and transported to Westchester where she was indicted on felony charges. She spent 13 months in jail while awaiting trial. Jing was ultimately acquitted of the felony charges but was convicted of a lesser offense of custodial interference in the second degree, a misdemeanor.²

While Jing was in jail, defendant Gail Hiler was awarded custody of Tristram by Order of Family Court Judge Sara Schechter dated March 20, 2003.³ Although Judge Schechter reviewed a report from Jing's psychiatrist detailing Jing's mental illnesses, including personality disorders and depression and a diagnosis of psychosis, she did not conduct a full hearing.

In or about July 2003, the Hilers sent Tristram to California to live with the Kellys. Tristram also lived for a time in North

² That conviction was upheld by the Appellate Division, Second Department by Decision dated March 27, 2007 (38 A.D.3d 926).

³ Jing's mother, Ling Xiong, had also, unsuccessfully, sought custody.

Carolina with Gail Hiler's sister, Tracy Kelly, who was named as a defendant herein but who, according to defendants, was never served with process. Plaintiff claims that Tristram's whereabouts were not disclosed to either Jing or the Family Court,⁴ although defendants claim that Ms. Hiler's counsel informed the Family Court and all parties on August 6, 2004 that Tristram was no longer residing in the Hiler home.

In a Decision dated November 17, 2005, In re Tristram K., 25 A.D.3d 222, the Appellate Division, First Department, reversed the awarding of permanent custody to defendant Gail Hiler "as an unauthorized disposition under the Family Court Act."

The Court (Ellerin, J.) held that

[i]n view of the fact that the mother was incarcerated in Westchester County pending her trial for custodial interference and was therefore not in a position to care for the child and the fact that the child was already living with the aunt, the proper disposition on the neglect petition was placement of the child with the aunt for up to one year, ...

* * *

⁴ Another action was commenced by Jing in 2004 in the Supreme Court (under Index No. 302538/04) seeking custody modification and/or visitation rights. Plaintiff claims that Mr. Hiler told Justice Visitacion-Lewis that the child was still living with the Hilers. Defendants deny this allegation and claim that all discussions related solely to the legal issue of whether the Supreme Court should exercise jurisdiction over plaintiff's application in lieu of the Family Court. The case was disposed by Amended Decision and Order of the Hon. Laura Visitacion-Lewis dated March 19, 2004.

An order of temporary placement with the aunt would have best served the child's best interests by insuring that the case reappeared before the court for reassessment of his adjustment to the aunt's home and of the mother's emotional and psychiatric progress, and by making possible permanency planning with the mother, including the provision of necessary services and appropriate visitation to strengthen the parental relationship, as contemplated by article 10 [of the Family Court Act] and specified in § 1055. Instead, in the absence of the oversight mandated by § 1055, the aunt, without informing the law guardian or the court, removed the child from the jurisdiction and placed him with caregivers who had never been evaluated either by the court or by a child protective agency and whose identity and location remain unknown to the law guardian.

More than two and a half years has passed since the aunt was awarded permanent custody on the neglect petition and circumstances have changed (citation omitted). Tristram is no longer living with his aunt, and there has been no assessment of his present home life or his current emotional and psychological status. Moreover, he has had no contact with his mother for nearly three years and there has been no new information about her emotional, psychological and financial status. Thus, a new dispositional hearing must be held to assess the current situation and determine whether temporary placement with his current caregivers, with services and visitation to the mother, or one of the other alternatives provided for in § 1052(a) is the most appropriate disposition.

Id. at 224-225.

The Court was critical of the Family Court's failure to conduct a hearing attended by Jing either in person or by telephone. The Court noted that

[h]ad a full evidentiary hearing been held, with all parties having the opportunity to participate, the mother could have challenged the evidence that was presented as to her ability to care for her son or presented her own evidence in rebuttal. For example, she could have explained her reasons for leaving the jurisdiction with

Tristram, which resulted in the custodial interference charge and ultimate conviction. Such an explanation might have offered insight into the prevailing state of affairs at the time that she fled and a fuller picture of all the facts and circumstances relevant to a disposition on the custody petitions.

We note that even if there had been a finding of extraordinary circumstances to support an award of custody to a nonparent, questions about the aunt's willingness to take permanent custody of the child raised a concern as to whether such an award was in the child's best interests -- a well-founded concern, as it turned out, in light of her subsequently removing the child from the jurisdiction and leaving him with other individuals.

In re Tristram K., supra at 227.

The Court expressed the further concern that Tristram, then almost five and a half years old, had had no contact with his mother for nearly three years, and noted that Tristram, who had started school, would soon learn that

he is not the biological child of his present caregivers and will want to know who his biological parents are, and that if his mother's efforts to establish a relationship with him are thwarted, he may one day wonder whether she intentionally abandoned him and may feel anger and resentment toward his caregivers for depriving him of access to her.

Id. at 228.

The Court thus directed an immediate hearing to "determine, based on evaluations of Tristram's current living situation and the mother's emotional and psychiatric status, whether reinstating visitation is in Tristram's best interests and, if so, how the resumption of visits should be initiated and conducted", and to

explore supervised visitation between the child and his maternal grandparents.

Plaintiff filed a petition for a writ of habeus corpus in the Supreme Court in December 2005 with assistance from the Sanctuary for Families, Inc., Center for Battered Women's Legal Services. Plaintiff claims that it was only prior to this return date that the Hilers disclosed that Tristram was living with the Kellys.

Also, on or about December 2005, the Kellys moved in Family Court for leave to intervene in the ongoing proceeding and for temporary custody of Tristram. Their motion for temporary custody was denied, but the Family Court granted the Kellys leave to intervene, as well as 'parole' of Tristram pending the return date.

In a Decision dated November 2, 2006, In re Tristram K, 36 A.D.3d 147, the Appellate Division, First Department reversed the Family Court's decision, finding that the Judge had erred in permitting intervention by the Kellys over Jing's express objection, and remanded the matter to the Family Court for "expedited hearings on the dispositional phase of the neglect proceeding, custody and visitation." Id. at 153.

Subsequent to the oral argument on these motions, Judge Schechter ruled by Decision and Order dated April 13, 2007, that

Tristram should be placed directly in the custody of the Kellys pursuant to Family Court Act Section 1055(a) until the completion of the next permanency hearing, with professionally supervised visits by the mother. Judge Schechter indicated that she had reviewed Jing's psychological history, including a recent report from Dr. Andrea Vazzana, a forensic psychologist associated with the Family Court Mental Health Services, who was of the opinion that Jing's "depression was in full remission, but found that her principal diagnosis is Personality Disorder Not Otherwise Specified, with Narcissistic and Borderline Features."

Judge Schechter found that Jing's

narcissistic focus requires that all contact between [Jing] and [Tristram] be professionally supervised until the child is completely comfortable with her. A therapist in California has already been selected to prepare the child to be reintroduced to [Jing], and she has already conducted preliminary sessions with the current caretakers in that regard. The schedule for a meeting of [Jing] and [Tristram] will be determined in accord with the reports of that therapist as to the child's readiness and ability to cope with that development.

Judge Schechter denied a request for visitation by Jing's mother "on best interest grounds", finding, inter alia, that the reintroduction of Jing "will fully tax the child's emotional reserves for the foreseeable future."⁵

⁵ Jing has filed a Notice of Appeal from Judge Schechter's Decision.

By letter dated July 7, 2007 from plaintiff's counsel and a letter dated July 30, 2007 from defendants' counsel, this Court was informed that Jing had recently visited with Tristram on several occasions in California.

The next permanency hearing is apparently scheduled to be held by the Family Court on August 28, 2007.

Discussion

Defendants argue that Jing lacks standing to bring an action on behalf of Tristram since she does not have any form of legal custody of the child.

Plaintiff seeks to remedy this procedural problem by moving to be appointed Guardian Ad Litem for Tristram.

Defendants argue that: (a) plaintiff has not made the requisite showing in support of her application, because Jing, who has a minimal income, cannot submit an affidavit showing that she has the ability to answer for any damage sustained by her negligence or misconduct, as required by CPLR § 1202(c); (b) Jing has a conflict of interest because Tristram may have claims against her stemming from his wrongful abduction; and (c) Jing is not fit

to serve as a Guardian Ad Litem based on her past behavior and mental illness.

Based on the papers submitted and the oral argument held on the record on January 10, 2007, this Court finds that it would be premature to appoint any of the parties to the Family Court proceeding as the Guardian Ad Litem herein prior to the final resolution by the Family Court of the custodial issues. Plaintiff's motion must, therefore, be denied.⁶

Jing thus lacks standing to institute an action on behalf of Tristram. See, Diaz v. Montefiore Medical Center Henry & Lucy Moses Div., 299 A.D.2d 254 (1st Dep't 2002). Therefore, the claims brought by Jing on Tristram's behalf are dismissed without prejudice.

Defendants argue that the claims brought on behalf of Jing must also be dismissed because the allegations center on custody matters litigated within the Family Court. Defendants contend that plaintiff's claims that Tristram was improperly sent to the Kellys' home in California and that said placement was concealed from her,

⁶ Although, as plaintiff's counsel pointed out on the record, this Court is authorized to appoint another individual, including a relative or friend (see, CPLR § 1202) as a Guardian Ad Litem, this Court declines to do so in the absence of a formal motion seeking said relief.

are issues that have already been considered and addressed by the Family Court.

Plaintiff argues in opposition that the claims asserted in the Amended Complaint constitute separate, distinct, independent tort claims which are outside of the jurisdiction of the Family Court and thus should be entertained by this Court.

However, plaintiff's remedy, if any, for defendants' alleged deception of the Family Court as to Tristram's whereabouts lies exclusively in the Family Court proceeding itself, not in a plenary action. See, Melnitzky v. Owen, 19 A.D.3d 201 (1st Dep't 2005); Vinokur v. Penny Lane Owners Corp., 269 A.D.2d 226 (1st Dep't 2000); Yalkowsky v. Century Apartments Associates, 215 A.D.2d 214 (1st Dep't 1995).

Plaintiff's first cause of action for intentional infliction of emotional distress, as well as her fifth cause of action for negligence and her sixth cause of action for gross negligence, based upon allegations involving statements and actions in the context of that proceeding (including the purported deception of the Family Court) must, therefore, be dismissed. See, Yalkowsky v. Century Apartments Associates, supra at 215; Lazich v. Vittoria & Parker, 189 A.D.2d 753 (2nd Dep't 1993), app. dism'd, 81 N.Y.2d 1006 (1993).

Plaintiff's second cause of action for abuse of process must also be dismissed since the institution of a civil action "is not legally considered process capable of being abused." See, Curiano v. Suozzi, 63 N.Y.2d 113, 116 (2005). See also, Roberts v. 112 Duane Associates, LLC, 32 A.D.3d 366 (1st Dep't 2006), lv. to app. denied, _N.Y.3d_ (2007).

Moreover, to the extent that plaintiff alleges in connection with the second cause of action that "the Hilers made false allegations and material misrepresentations to the New York County Family Court in seeking a permanent order of custody", plaintiff's remedy lies exclusively in the Family Court and the appeals stemming from that proceeding. Melnitzky v. Owen, supra.

Plaintiff's third cause of action seeks to recover damages for malicious prosecution stemming from the Family Court proceeding.

In order "[t]o state a claim for malicious prosecution, a plaintiff must prove (1) the initiation or continuation of legal action against [her], (2) termination of the proceeding in [her] favor, (3) absence of probable cause to commence the proceeding, and (4) actual malice (citations omitted)." Rivera v. City of New York, 40 A.D.3d 334, 337 (1st Dep't 2007).

However, the underlying Family Court proceeding which is still ongoing has not been terminated in plaintiff's favor. Therefore, plaintiff's third cause of action must be dismissed.

The fourth cause of action seeks monetary damages based on defendants' alleged interference with plaintiff's custodial rights. However, it has been held that to the extent that intentional interference with parental custody is recognized as a cognizable claim in New York, said tort does not give rise to a claim for money damages. See, Pittman v. Grayson, 149 F.3d 111 (2nd Cir. 1998), cert denied, 528 U.S. 818 (1999); McGrady v. Rosenbaum, 62 Misc.2d 182 (Sup. Ct., N.Y. Co. 1970), aff'd, 37 A.D.2d 917 (1st Dep't 1971).

Finally, the seventh, eighth and ninth causes of action for conversion, breach of fiduciary duty and accounting relate to Craig's Estate, and any claims relating to the administration of his Estate should have been filed in the Surrogate's Court. See, generally, Nichols v. Kruger, 113 A.D.2d 878 (2nd Dep't 1985). Moreover, plaintiff, who was divorced from Craig in 2001, has made no showing that she is a beneficiary or holds any other interest in his Estate, and thus lacks standing to assert said claims.

Accordingly, the Clerk may enter judgment dismissing all the causes of action asserted on behalf of Jing with prejudice, and the

fifth and sixth causes of action to the extent asserted on behalf of Tristram without prejudice, all without costs or disbursements.

This constitutes the decision and order of this Court.

Dated: August 2, 2007



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.

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